STATE OF MICHIGAN

COURT OF APPEALS

ERIC A. BRAVERMAN, Personal Representative of the Estate of WILLIE WALLER, Deceased,

Plaintiff-Appellant,

v

WILLIAM BEAUMONT HOSPITAL, ANDREW WILSON, M.D., ANTONIO BONFIGLIO, M.D., KIRSTEN GUENTHER, M.D., and BIO-MEDICAL APPLICATIONS OF MICHIGAN, INC., d/b/a FMC UNIVERSITY,

Defendants-Appellees.

UNPUBLISHED
August 28, 2007

No. 268106
Oakland Circuit Court
LC No. 05-069594-NH

Before: Murray, P.J., and Smolenski and Servitto, JJ.

PER CURIAM.

I. Introduction

In this wrongful death medical malpractice action, plaintiff appeals from the trial court's order granting defendants' motions for summary disposition pursuant to MCR 2.116(C)(7). We conclude that under the wrongful death saving provision, MCL 600.5852, plaintiff, the successor personal representative for the decedent's estate, timely filed this action, and furthermore, that although plaintiff failed to comply with the notice provisions of MCL 600.2912b(1) in regard to individual defendant Frensius, plaintiff did comply with the notice provisions regarding all other defendants. Accordingly, we vacate the January 10, 2006, order in its entirety and remand to the trial court for further proceedings consistent with this opinion.[1]

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[1] By order entered January 24, 2007, we held the appeal in abeyance pending our Supreme Court's decision in *Washington v Sinai Hospital of Greater Detroit*, which the Court decided on June 27, 2007. See *Washington v Sinai Hospital of Greater Detroit*, 478 Mich 412; 733 NW2d 755 (2007). Because *Washington* was decided solely on a res judicata theory, and defendants have not raised res judicata on appeal, *Washington, supra*, has no affect on this case.

II. Facts and Procedural Background

This case arises out of a wrongful death action based on acts of medical malpractice for the negligent treatment of a head injury sustained by plaintiff's decedent, William ("Willie") Waller. On March 20, 2002, Willie Waller underwent dialysis at defendant Fresenius' medical care facility.[2] That afternoon, Willie's wife, Stella Waller, contacted Fresenius and indicated that her husband had fallen in the driveway of their home, had a "big knot" on his forehead, and was experiencing mental status changes. Stella was then advised to take her husband to the emergency room. That same day, Willie was admitted to William Beaumont Hospital in Royal Oak, where records indicate he had a large hematoma (bruise), lightheadedness, and trouble with his vision. Willie's condition continued to worsen, and he died at the hospital on March 23, 2002.

Following the death of her husband, on June 10, 2002, Stella was issued letters of authority appointing her as the original personal representative of the estate. On May 14, 2004, Stella gave defendant Beaumont Hospital and defendants physicians' notice of intent to bring a medical malpractice action, thus triggering the 182-day statutory waiting period pursuant to MCL 600.2912b.[3] On June 10, 2004, after mailing the notice of intent, but prior to the expiration of the mandatory waiting period, Stella filed a wrongful death action alleging negligence and medical malpractice by defendants Beaumont Hospital, Dr. Andrew Wilson, Dr. Antonio Bonfiglio and Dr. Kirsten Guenther. On August 11, 2004, Eric Braverman was appointed successor personal representative of the estate.

Defendants responded by filing a motion for summary disposition pursuant to MCR 2.116(C)(7) for Stella's failure to file the complaint within the applicable statutory period. Defendants argued that the cause of action had to be dismissed because the personal representative did not wait the requisite time period called for by MCL 600.2912b, and therefore she improperly filed the complaint during the statutory waiting period.

Before defendants' motion was decided, the parties stipulated to dismissal without prejudice of the case, and the trial court entered an order of dismissal without prejudice on December 14, 2004. Also on December 14, 2004, Braverman, the successor personal representative, filed a wrongful death action again alleging medical malpractice and negligence claims against defendant Beaumont Hospital and the individual defendant physicians, while also adding a second count against defendant Fresenius for its failure to provide medical records,

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[2] In an order entered on December 6, 2005, the parties stipulated to amend the caption and pleadings to substitute defendant Bio-medical Applications of Michigan, Inc., for defendant Fresenius Medical Care Cardiovascular Resources, Inc. Nevertheless, given that the party refers to itself as defendant Fresenius in its brief on appeal, we do the same throughout this opinion.

[3] MCL 600.2912b requires a claimant to wait 182 days from the date the notice of intent is filed before the claimant may commence a lawsuit. If no written response to the notice is made within 154 days, suit may be brought on the 155th day.

which precluded plaintiff from bringing a cause of action for medical malpractice against Fresenius.[4]

Thereafter, defendants filed motions for summary disposition under MCR 2.116(C)(7) for failure to file the complaint within the allotted statutory period.[5] Defendants argued that, pursuant to *Waltz v Wyse*, 469 Mich 642; 677 NW2d 813 (2004), the second complaint was time barred. Defendants also argued that a successor personal representative could not file the same complaint that was previously filed, and that MCL 700.3613 requires that the successor personal representative be substituted in the prior action, which in this case was prematurely filed and subsequently dismissed. Furthermore, defendants contended that *Eggleston v Bio-Medical Applications of Detroit*, 468 Mich 29; 658 NW2d 139 (2003), was inapplicable because no medical malpractice action was filed before the death of the initial personal representative in *Eggleston*, and the successor personal representative was appointed by necessity after the initial personal representative's death. Defendants relied on the unpublished opinion of *King v Briggs*, unpublished opinion per curiam of the Court of Appeals, issued July 12, 2005 (Docket Nos. 259136, 259229), where this Court held that a successor personal representative must be substituted in an action already commenced and does not have an additional two years under MCL 600.5852 to file a malpractice claim. Defendants also contended that the second suit was barred by res judicata.

On November 16, 2005, plaintiff filed a response, arguing that pursuant to *Eggleston*, the plain language of MCL 600.5852 indicates that a successor personal representative may commence an action at any time within two years after letters of authority have been issued, and therefore, the action was timely and should not be dismissed. In reply, defendants argued that plaintiff's attempt to revive an untimely complaint by substituting a successor personal representative was prohibited under *King*, *supra*.

At the December 21, 2005, hearing on defendants' motions for summary disposition, defendants presented the trial court with a copy of *McLean v McElhaney*, 269 Mich App 196; 711 NW2d 775 (2005), pointing out that this Court ruled that a successor personal representative could not bring a lawsuit that was filed untimely by the initial personal representative. Plaintiff responded that *McLean* was distinguishable since in the instant case the successor personal representative actually filed the second complaint in his name. Following this exchange, the trial court ruled that defendants were entitled to summary disposition. The trial court based its decision on this Court's unpublished decision in *King*:

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[4] The initial complaint was filed in Oakland Circuit Court, but was dismissed without prejudice. Subsequently, the successor personal representative filed the case in Wayne Circuit Court. The trial court denied defendants' motion to change the venue, but this Court reversed the trial court's ruling. *Braverman v William Beaumont Hosp*, unpublished order of the Court of Appeals, entered July 22, 2005 (Docket No. 263194). On remand, the trial court changed the venue back to Oakland County.

[5] Besides filing its own motion for summary disposition, defendant Fresenius later joined in codefendants' motion for summary disposition.

> This Court finds that the holding in King v Briggs, that was decided July 12th, 2005, Docket Numbers 259136 and 259229 instructive and on point with the case at bar. As the King Court noted, the issue to be considered is whether a P.R. who fails to diligently pursue a malpractice cause of action within the allotted time may nevertheless save the action from dismissal by substituting another personal representative. MCL 700.3613 states that a successor P.R. must be substituted in all actions and proceedings in which the former personal representative was a party. The Court found that the successor representative had to be substituted in the action already commenced and did not have an additional two years under MCL 600.5852 to pursue the malpractice claim.
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> In this case, Eric Braverman was appointed successor P.R. on August 11, 2004. The first lawsuit was not dismissed until December 14, 2004. Consequently, Braverman stood in the shoes of the initial P.R. who did not file it – timely file the action. Had no Complaint been filed by the original P.R. Eagleston [sic] provided that the successor P.R. had two years from the date of the appointment to file the action. This case is thus distinguishable from the Eagleston and more similar to the facts in King. Summary Disposition is therefore proper pursuant under [sic] [to]MCR 2.116(C)(7). Defendants' Motions are granted.

On January 10, 2006 the trial court entered a written order granting defendants' motions for summary disposition pursuant to MCR 2.116(C)(7) and dismissing plaintiff's claims with prejudice.[6]

III. Analysis

We review a trial court's decision on a motion for summary disposition brought pursuant to MCR 2.116(C)(7) de novo to determine whether the moving party was entitled to judgment as a matter of law. *Verbrugghe v Select Specialty Hosp – Macomb Co Inc*, 270 Mich App 383, 387; 715 NW2d 72 (2006). In addition, "[i]n making a decision under MCR 2.116(C)(7), we consider all documentary evidence submitted by the parties, accepting as true the contents of the complaint unless affidavits or other appropriate documents specifically contradict it." *Bryant v Oakpointe Villa Nursing Ctr, Inc*, 471 Mich 411, 419; 684 NW2d 864 (2004).

A. Timeliness

Plaintiff argues that the trial court erred in rejecting his argument that his filing of a new wrongful death complaint as successor personal representative was proper and timely under MCL 600.5852 and the decisions in *Eggleston* and *Verbrugghe*. In general, the period of limitations for a plaintiff bringing a medical malpractice action is two years. MCL 600.5805(6).

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[6] On January 26, 2006, the trial court issued an order nunc pro tunc making the order granting the motions for summary disposition with prejudice effective January 10, 2006.

There is, however, a statutory exception to this period of limitations that is relevant to this case. MCL 600.5852 provides:

> If a person dies before the period of limitations has run or within 30 days after the period of limitations has run, an action which survives by law may be commenced by the personal representative of the deceased person at any time within 2 years after letters of authority are issued although the period of limitations has run. But an action shall not be brought under this provision unless the personal representative commences it within 3 years after the period of limitations has run.

Interpreting this provision, this Court has explained that "a personal representative may file a medical malpractice suit on behalf of a deceased person for two years after letters of authority are issued, as long as that suit is commenced within three years after the two-year malpractice limitations period expired." *Farley v Advanced Cardiovascular Health Specialists, PC*, 266 Mich App 566, 572-573; 703 NW2d 115 (2005).[7]

Plaintiff argues that under *Eggleston*, *Verbrugghe* and MCL 600.5852, the successor personal representative had a fresh two-year period to bring a medical malpractice claim. In *Eggleston*, the Michigan Supreme Court addressed the above statute and held that a successor personal representative, just like an initial representative, has a two-year period to bring suit that begins at the time the successor personal representative's letters of authority are issued. *Eggleston*, *supra* at 30. The Supreme Court stated:

> The statute simply provides that an action may be commenced by the personal representative at any time within two years after letters of authority are issued although the period of limitations has run. The language adopted by the Legislature clearly allows an action to be brought within two years after letters of authority are issued to the personal representative. The statute does not provide that the two-year period is measured from the date letters of authority are issued to the initial personal representative. [*Eggleston*, *supra* at 33 (internal citation omitted).]

Defendants claim that *Eggleston* is distinguishable from the instant case because in *Eggleston*, no medical malpractice action had been filed before the death of the original personal representative, whereas here, the action was already commenced and plaintiff successor personal representative filed a second lawsuit. However, while this case may be factually distinctive from *Eggleston*, this Court has strictly applied the plain language of MCL 600.5852 as written, under facts similar to the instant case.

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[7] MCL 600.5852 is a savings provision and not a separate period of limitations. It is only a limitation on the two-year saving provision itself. Thus, the three-year ceiling limits the two-year saving period to those cases brought within three years of when the malpractice limitations period expired. *Farley*, *supra* at 575.

Verbrugghe, like the present case, was a wrongful death medical malpractice case. The original personal representative was appointed in December 2001 and filed a wrongful death action in June 2004. Defendants filed motions for summary disposition and, while they were still pending, a successor personal representative was appointed; the successor personal representative then filed a separate action in his own name in October 2004. The original action was eventually dismissed as untimely, and the trial court subsequently dismissed the second claim as well. On appeal, this Court reversed the trial court, applying *Eggleston* and finding that MCL 600.5852 has only two requirements for the timeliness of a successor personal representative's complaint, both of which were satisfied:

> As noted in *Eggleston*, the statute contains only two limitations on the circumstances under which a successor personal representative can take advantage of the two-year period of limitations: the decedent passing away during the limitations period and the successor receiving letters of authority. Once these events occur, the statute simply indicates that if a lawsuit is brought by a successor, it must be filed within two years of the issuance of the letters of authority, but no more than five years after the cause accrued. [*Verbrugghe*, *supra* at 389-390.]

If statutory language is clear and unambiguous, "then judicial construction is neither necessary nor permitted" and a court is required to apply the statute as written. *Linsell v Applied Handling, Inc*, 266 Mich App 1; 697 NW2d 913 (2005). The plain language of MCL 600.5852 allows the personal representative to commence an action within two years of being issued letters of authority and within three years after the period of limitations expires. The statute does not distinguish whether letters of authority are issued to the initial or successor personal representative. We therefore reject defendants' argument that *Eggleston* only applies to situations where a successor representative is appointed by necessity rather than by choice. The plain language of MCL 600.5852 does not contain any such limitation, and we decline to read one into the statute.

Here, the original personal representative was issued letters of authority on June 10, 2002, and had two years from that date (June 10, 2004) to commence a wrongful death medical malpractice action. Plaintiff was appointed successor personal representative and issued letters of authority on August 11, 2004. Plaintiff filed his complaint on December 14, 2004, which was within two years after letters of authority were issued to him and less than three years after the medical malpractice period of limitations had run. Thus, under the plain language of MCL 600.5852, and consistent with its interpretation in *Eggleston* and *Verbrugghe*, we conclude that plaintiff's action was timely filed. Therefore, defendants were not entitled to summary disposition.

We also reject defendants' argument, adopted by the trial court, that the successor representative had to be substituted in an action already commenced and did not have an additional two years under MCL 600.5852 to save the action from dismissal. The trial court ruled that the successor personal representative was required, pursuant to MCL 700.3613, to assume the position and actions of the initial personal representative. However, this Court has determined that while the statute has procedural implications for the successor personal representative, it does not preclude him from initiating a separate action. *Verbrugghe*, *supra* at 392; *McMiddleton v Bolling*, 267 Mich App 667, 672-673; 705 NW2d 720 (2005) (holding that a

successor personal representative has authority to file a second lawsuit, despite the initial representative having filed an untimely one, as long as the second complaint is otherwise timely under MCL 600.5852 and *Eggleston*).

MCL 700.3701 provides:

> A personal representative's duties and powers commence upon appointment. A personal representative's powers relate back in time to give acts by the person appointed that are beneficial to the estate occurring before appointment the same effect as those occurring after appointment. . . . [B]efore or after appointment, a person named as personal representative in a will may carry out the decedent's written instructions relating to the decedent's body, funeral, and burial arrangements. A personal representative may ratify and accept an act on behalf of the estate done by another if the act would have been proper for a personal representative.

As recognized in *Verbrugghe*, under *Eggleston* and MCL 600.5852, "a successor personal representative cannot rely on the untimely filed complaint that was filed before she was appointed." *Verbrugghe*, *supra* at 392, quoting *McMiddleton*, *supra* at 673. Furthermore, this Court has recognized that under the statute "any ratification by a successor personal representative of a prior act required that the prior act be 'beneficial to the estate.'" *Verbrugghe*, *supra* at 392, quoting MCL 700.3701; see also *McMiddleton*, *supra* at 674. Since the initial complaint was untimely, which is of no benefit to the estate, plaintiff had no basis for the claim's ratification. Therefore, under these facts, plaintiff is not prevented from proceeding with a second lawsuit, despite the dismissal of the initial representative's lawsuit. *Verbrugghe*, *supra* at 391.[8]

B. Notice of Intent

As an alternative argument, defendants contend that summary disposition was proper because plaintiff failed to give appropriate notice pursuant to MCL 600.2912b. Defendants raised this issue below; however, the trial court never decided the matter. An appellate court is obligated to review only issues which are properly raised and preserved. *People v Stanaway*, 446 Mich 643, 694; 521 NW2d 557 (1994). Generally, an issue is not properly preserved if it is not raised before, addressed or decided by the trial court. *Polkton Twp v Pellegrom*, 265 Mich App 88, 95; 693 NW2d 170 (2005); *Brown v Loveman*, 260 Mich App 576, 599; 680 NW2d 432 (2004). However, appellate consideration of an issue raised before the trial court, but not specifically decided by the trial court is not necessarily beyond our reach. *Pro-Staffers, Inc v Premier Manufacturing Support Services, Inc*, 252 Mich App 318, 324; 651 NW2d 811 (2002).

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[8] In light of our decision that plaintiff's filing was timely and summary disposition was inappropriate, it is unnecessary to address plaintiff's alternative argument on appeal concerning the doctrine of equitable tolling as applied in *Mazumder v University of Michigan Regents*, 270 Mich App 42; 715 NW2d 96 (2006), which was rejected by our Court in *Ward v Siano*, 272 Mich App 715; 730 NW2d 1 (2006).

When, such as is the case here, the issue is a question of law for which the facts necessary for resolution have been presented, we will review the issue. *Id*.

MCL 600.2912b(1) provides:

> Except as otherwise provided in this section, a person shall not commence an action alleging medical malpractice against a health professional or health facility unless the person has given the health professional or health facility written notice under this section not less than 182 days before the action is commenced.

A predecessor personal representative and a successor personal representative acting in a representative capacity for the same estate are considered to be the same person under MCL 600.2912b(1), and therefore, "a notice of intent sent by a predecessor personal representative can support a complaint filed by a successor personal representative." *Braverman v Garden City Hospital*, __ Mich App __; __ NW2d __ (2007).

In the case at bar, although plaintiff successor personal representative failed to serve his own separate notice of intent on defendant Beaumont Hospital and the individual physician defendants, he properly relied on the original notice served by the initial personal representative. Therefore, under these facts, plaintiff is also not prevented from proceeding with his lawsuit against Beaumont Hospital and the individual physician defendants on the ground that he did not comply with MCL 600.2912b(1). *Braverman, supra*.

However, since the successor personal representative recently added Fresenius as a defendant for failing to provide medical records, it follows that the predecessor personal representative never filed a notice of intent upon Fresenius. Furthermore, while plaintiff filed his own notice of intent for defendant Fresenius, this notice was filed improperly under MCL 600.2912b(1). Notice of intent was issued to Fresenius on December 1, 2004. Plaintiff subsequently filed his complaint on December 14, 2004, in clear violation of the 182-day statutory waiting period. Therefore, plaintiff failed to serve proper notice of intent on Fresenius. MCL 600.2912b(1).

V. Conclusion

We reverse the trial court's grant of defendants' motions for summary disposition based on MCL 600.5852, and remand for further proceedings consistent with this opinion, including dismissal of the case against Fresenius without prejudice.[9] We do not retain jurisdiction.

/s/ Christopher M. Murray
/s/ Michael R. Smolenski
/s/ Deborah A. Servitto

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[9] We note that the proper remedy for failing to provide proper notice under MCL 600.2912b(1), is dismissal without prejudice. *Verbrugghe, supra* at 397.